TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR,

vs.

MONROE D. HERINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JANUARY 9, 1901.

(18,015.)

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 9th day of November, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition in error and case-made from the district court of Labette county, which petition in error and case-made are in words and figures as follows, to wit:

2 LEE CLARK
vs.
MONROE D. HERRINGTON. } 11637.

Petition in Error & Case-made.

Filed Nov. 9, 1899.

D. A. VALENTINE,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Petition in Error.

The said Lee Clark, plaintiff in error, complains of the said Monroe D. Herington, defendant in error, for that the said defendant in error at the May 1899 term of the district court of Labette county, Kansas, recovered a judgment by the consideration of said court against the said plaintiff in error, in the sum of $3,032.28, together with the costs of the action, in a certain action then and there pending in said court wherein the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, a case-made embracing the judgment and all the proceedings in which case duly certified, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff in error avers that there is error in said record and proceedings in this to wit:

1. The said court erred in holding and deciding that the evidence was sufficient to entitle the defendant in error, plaintiff below, to a judgment against the plaintiff in error, defendant below.

2. The said court erred in not deciding that the evidence was insufficient to sustain a judgment in favor of the plaintiff below and against the defendant below.

3. The said court erred in not rendering a judgment for the defendant below for costs.

4. The said court erred in overruling the motion of the de-
4 fendant below for a new trial.

5. The said court erred in not sustaining the motion for a new trial, and in not granting the defendant below a new trial.

6. The said court erred in rendering a judgment for the plaintiff below instead of for the defendant below.

Wherefore, plaintiff in error prays that said judgment be reversed and he be restored to all things which he has lost thereby.

T. N. SEDGWICK,
Attorney for Plaintiff in Error.

Filed Nov. 9, 1899.
D. A. VALENTINE,
Clerk Supreme Court.

5 "EXHIBIT A." Filed October 25, 1899. John Mayer, Clerk, by Kate Hoagland, Deputy.

In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

Case-made.

Be it remembered, that heretofore, to wit, on April 20th, 1899, the above-named plaintiff commenced the above action in the district court of Labette county, Kansas, by filing in the office of the clerk of said court his petition in words and figures as follows, to wit:

(Title omitted.)

The plaintiff complains of the said defendant and for his cause of action herein against him says: That on the 5th day of September, 1884, the defendant Lee Clark, in consideration of the sum of $1,600 in money to him paid, by his warranty deed conveyed to one William E. Birchmore in fee-simple the following lands, to wit: The south half of the northwest quarter, and the south half of the southwest quarter of section 22, township 15, range 5 east, in Morris county, State of Kansas.

The said deed contained a covenant on the part of the defendant, of which the following is a copy, to wit: "And the said Lee Clark does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that he will warrant and defend the same
6 in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever against all persons lawfully claiming the same." A copy of which deed is hereto attached and marked "Exhibit A." The said William E. Birchmore conveyed said land to one O. C. Price, and his heirs and assigns, together with all his rights under the said deed of warranty, and afterwards the said O. C. Price and his wife Jennie J. Price conveyed said land to the plaintiff. Copies of which said deeds are hereto attached and marked respectively, Exhibit "B and C."

The said defendant Lee Clark claimed title thereto under a land

grant of the United States of America, to the State of Kansas for the use of the Missouri, Kansas and Texas Railroad Company, and claims title under a deed from said railroad company to the said Lee Clark. That said land has been heretofore determined by authority of the United States not to be within the terms of said grant, but to be the property of the Government of the United States, subject to homestead entry under the act of Congress; that at the conveyance of said land to the said O. C. Price, the said William E. Birchmore, under his said deed from the defendant Lee Clark, put the said O. C. Price in possession of said land, who remained in possession of said land until he conveyed the same to the plaintiff, who likewise went into possession thereof, and remained in the actual possession thereof until ousted therefrom by a claimant under the act of Congress, known as the homestead law, as hereinafter stated.

That the defendant has not warranted or defended the premises to the plaintiff, but that the title to the land was in the United States; and on the — day of —— 1887, one James Cox settled upon said land under the act of Congress known as the homestead act, and dispossessed the plaintiff therefrom, and still lawfully hold the same and the possession thereof, and that at the time said deed was
7 made by the defendant, he had no title thereto whatever; but that the title was in the United States of America; by reason whereof the plaintiff has been damaged in the sum of $2,500.

Wherefore he prays judgment against the said defendant for the said sum of $2,500 and his costs herein.

JOHN H. MAHAN,
Attorney for Plaintiff.

To the clerk:

Issue summons in this cause to the sheriff of Labette county for service, returnable in 10 days. Judgment is claimed for $2,500.00.

JNO. H. MAHAN,
Plaintiff's Attorney.

"EXHIBIT A."

Deed—General Warranty.

This indenture, made this 6th day of September in the year of our Lord one thousand eight hundred and eighty-four between Lee Clark and Helen E. Clark his wife of Parsons in the county of Labette and State of Kansas of the first part and E. W. Birchmore of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of sixteen hundred dollars to them duly paid, the receipt of which is hereby acknowledged, have sold and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situated in the county of Morris and State of Kansas, described as follows, to wit: The south half of the northwest quarter and the north half of the southwest quarter of section twenty-two (22) township fifteen (15) range five (5) containing one hundred and sixty acres more or less, with the ap-

purtenances and all the estate, title and interest of the said
8 parties of the first part therein.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever: And the said Lee Clark does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted and seized of a good and indefeasible estate of inheritance therein free and clear of all incumbrance, and that he will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever against all persons lawfully claiming the same.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year last above written.

LEE CLARK. [SEAL.]
HELEN E. CLARK. [SEAL.]

Signed, sealed and delivered in presence of
JOSEPH L. MOORE,
ROB'T ADAMS,
Witnesses to Helen E. Clark.

STATE OF NEW YORK, }
Montgomery County, } ss:

Be it remembered that on this 8th day of Sept. A. D. 1884, before me, the undersigned, Joseph L. Moore, a notary public in and for said county and State, came Helen E. Clark to me personally known to be the same person who executed the foregoing instrument and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

JOSEPH L. MOORE,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires March 30th, 1885.

STATE OF KANSAS, }
Labette County, } ss:

Be it remembered that on this 19 day of September A. D. 1884, before me, E. B. Stevens, a notary public in and for said county and
State, came Lee Clark to me personally known to be the same
9 person who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

E. B. STEVENS,
[NOTARIAL SEAL.] *Notary Public.*

Commission expires January 29, 1887.

Said deed being endorsed as follows:

Deed. General warranty. From Lee Clark and wife to W. E. Birchmore. Entered in transfer record in my office this — day of —— A. D. 188– —— —— county clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 7th day of October, A. D. 1884 at 8 o'clock a. m. and duly recorded in Book S on page 303. Fee $—.

A. W. SIMCOCK,
Register of Deeds.

[SEAL.]

M. R.,

Certificate of Copy.

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie, register of deeds in and for the county and State aforesaid do hereby certify that the warranty deed hereto attached is a true copy of the original warranty deed now on record in my office.

Witness my hand and official seal this 16 day of April, 1889.

JNO. S. PROONIE,
Register of Deeds.

[SEAL.]

Recorded vol. S, page 303 of deeds.

"EXHIBIT B."

Deed—Quitclaim.

This indenture, made this 15th day of January 1885, between W. E. Birchmore, unmarried, of Abilene in the county of Dickinson and State of Kansas of the first part, and Orlander C. Price of the second part:

Witnesseth, that the said party of the first part for and in consideration of the sum of one hundred dollars to him duly paid, has sold and by these presents does remise, release and quitclaim unto the said party of the second part, his heirs and assigns, forever, all that tract and parcel of land situated in the county of Dickinson and State of Kansas, and described as follows, to wit: The south half of the northwest quarter & north half of the southwest quarter in section twenty-two (22) in township fifteen (15) south of range five (5) east of sixth principal meridian, with the appurtenances and all the estate, title and interest of said party of the first part therein.

To have and to hold all and singular the above-described premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand — seal the day and year above written.

W. E. BIRCHMAN.

Executed and delivered in presence of

—— ——,
—— ——,
Witnesses.

STATE OF KANSAS, } ss:
Dickinson County, }

Be it remembered that on this 15th day of January, A. D. 1885, before me, a notary public in and for said county and State, came W. E. Birchmore unmarried, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, the day and year last above written.

[NOTARIAL SEAL.] R. McCORMICK, *N. P.*

Com. expires Mar. 26, 1888.

11 Said deed being endorsed as follows:

Deed from W. E. Birchmore to O. C. Price. Entered in transfer record in my office this — day of —— A. D. 188– —— —— Co. clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 19 day of January, A. D. 1885, at 9 o'clock a. m., and duly recorded in Book S on page 463. Fee, $—

[SEAL.] A. W. SIMCOCK,
Register of Deeds,
Per J. K.

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie register of deeds in and for the county and State aforesaid, do hereby certify that the quitclaim deed hereto attached is a true copy of the original quitclaim deed now on record in my office.

Witness my hand and official seal this 16 day of April, 1899.

[SEAL.] JNO. S. PROONIE,
Register of Deeds.

Recorded vol. S page 463 of deeds.

"EXHIBIT C."

This indenture, made this — day of January A. D. 1885 between Orlander C. Price and Minnie J. Price his wife, of Morris county in the State of Kansas of the first part, and Monroe D. Herrington of Dickinson county in the State of Kansas of the second part

Witnesseth, that the said parties of the first part, in consideration of the sum of fifteen thousand dollars, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto said party of the second part, his heirs and assigns, all
12 the following-described real estate, situated in the county of Morris and State of Kansas, to wit: The north half of the southwest quarter (¼), except twelve (12) acres off of the south side of the northwest quarter (¼) of said southwest (¼) and the north half (½) of the southeast quarter (¼) and the southeast quarter (¼) of the southeast quarter (¼) of section twenty-one (21) and all of section twenty-two (22) and the north half (½) of section twenty-six (26) all in township fifteen (15) south of range five (5) east of the sixth (6th) principal meridian, containing eleven hundred and forty-eight (1,148) acres more or less. To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining forever:

And said Orlander C. Price and Minnie J. Price for themselves, their heirs, executors or administrators, do hereby covenant, promise and agree, to and with said party of the second part, that at the delivery of these presents they are lawfully seized in their own right, of an absolute and indefeasible estate of inheritance, in fee-simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever, except a mortgage to the Traveler's Insurance Company of seventy-five hundred — to Lee Clark; and that they will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said parties of the first part, their heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands the day and year first above written.

13 ORLANDER C. PRICE.
MINNIE J. PRICE.

Witness:
R. E. REYNOLDS.

STATE OF KANSAS, } ss:
Dickinson County, }

Be it remembered, that on this seventh day of January A. D. 1885 before me, the undersigned, a notary public in and for the county and State aforesaid, came Minnie J. Price and Orlander C

Price her husband who are personally known to me to be the same persons who executed instrument of writing, and such person- did duly acknowledge the execution of the same.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

[NOTARIAL SEAL.] R. E. REYNOLDS, *N. P.*

Term expires Oct. 31st, 1888.

Said deed being endorsed as follows:

Deed. General warranty, from Orlander C. Price and w-fe to Monroe D. Herington. Entered in transfer record in my office this — day of ——, A. D. 1888. —— ——, county clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 19 day of Jan'y A. D. 1885 at 9.45 o'clock a. m., and duly recorded in Book S on page 462. Fee, $—.

A. W. SIMCOCK,
[SEAL.] *Register of Deeds.*

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie, register of deeds in and for the county and State aforesaid, do hereby certify that the warranty deed hereto attached is a true copy of the original warranty deed now on record in my office.

JNO. S. PROONIE,
[SEAL.] *Register of Deeds.*

14 Recorded vol. S page 462 of deeds.

And thereafter, and on August 7th, 1889, the said plaintiff filed and amendment to said petition in words and figures as follows, to wit:

(Title omitted.)

And the said plaintiff, by way of amendment to his said petition heretofore filed in this cause, avers that at the time said Lee Clark conveyed said land to said W. E. Birchmore, the said W. E. Birchmore, as a part of the consideration for said conveyance made and delivered two promissory notes of three hundred dollars ($300) each, dated September 6th, 1884, one payable in one year after said date and the other payable in two years after date, with interest at the rate of eight per cent. per annum from said date, and for which interest, coupon notes were attached to said principal notes.

And after the conveyance mentioned in the original petition made by said W. E. Birchmore to the plaintiff of the land in controversy, the plaintiff paid to the order of said Lee Clark the full amount of

said two principal notes, to wit: the sum of $1,500 which said sum the plaintiff paid to the order of the defendant on the 25th day of November, 1885; that said Birchmore, in order to secure the payment of the said notes, mortgaged the land described in the plaintiff's petition, to the said Lee Clark, and that said debt was an apparent lien upon said land at the time the plaintiff took his conveyance therefor, and the said plaintiff relying upon the validity of the title of the said Lee Clark, so conveyed to said Birchmore and by said Birchmore conveyed to the plaintiff, paid said money to the defendant by his order, for the purpose of discharging said lien upon said land, and as a part of the purchase-money of said land, and so believed at all times that said title conveyed by said Lee Clark was good until long after the payment of the said notes, to wit, the year 1887, when he first discovered that said Lee Clark had no title to said land, and that his pretended title thereto had failed, and that said land was the land of the Government of the United States and that said Lee Clark had no title thereto or interest therein.

Wherefore your plaintiff prays judgment as in his original petition.

JNO. H. MAHAN,
Attorney for Plaintiff.

And afterwards, and within due time the defendant filed its answer to said above petition as amended, which said answer is in words and figures as follows, to wit:

(Title omitted.)

1. Comes now the defendant in the above-entitled cause and for his first defense and answer herein, to the petition of the plaintiff, denies each and every allegation in said petition contained, which are not in any way inconsistent with the allegations of the second defense to be herein stated.

2. And for a second defense and further answer herein this defendant alleges and shows to the court; that the Union Pacific Railway Company, Southern branch, was on the 25 day of September, 1865, duly organized and incorporated under the act of legislature of the State of Kansas, entitled "An act to provide for the incorporation and regulation of railroad companies." Approved Feb. 13, 1865, and that on the 3 day of Feb., 1870, its name was duly changed and made the Missouri, Kansas & Texas Railway Company under which name it has since been known; that on July 26, 1866, Congress passed an act granting lands to the State of Kansas, to aid in the construction of a southern branch of the Union Pacific railway and telegraph line from Ft. Riley, Kansas to Ft. Smith, Arkansas, which said act was approved July 26, 1866; that thereafter and on December 3, 1866, the said Union Pacific Railway Company, Southern branch, now the Missouri, Kansas & Texas Railway Company, filed with the Secretary of the Interior its map of definite location of its line of road; that the land mentioned in

plaintiff's petition is within twenty miles of the line of definite location and within twenty miles of the line the said railroad has actually built and constructed through Morris county in State of Kansas, in which said county the land described in plaintiff's petition is located; that said road was built and constructed through said Morris county, State of Kansas, prior to Jan. 1, 1870; that the terms, conditions and impositions of the act of Congress approved July 26th, 1866, were duly accepted in writing by the Union Pacific Railway Company, Southern branch, now known as the Missouri, Kansas & Texas Railway Company within one year after the passage of said act, and in compliance with section 7 of said act; that on July 2, 1863, one William M. Walters made homestead entry upon said land described in plaintiff's petition, and thereafter and on October 7, 1875, said entry was cancelled by order of the Commissioner of the General Land Office, because of the failure of the said William M. Walters to comply with the law in regard to making improvements upon the same, and because the said William M. Walters had long prior to October, 1875, left and abandoned the same, and thereafter and on October 22, 1877, said land was selected by the Missouri, Kansas & Texas Railway Com-
17 pany to indemnify it under the act of July 26, 1866, for lands taken by homestead and pre-emption settlements within the 10-miles limits of the grant of land made by said act, which said selection was in compliance with the Commissioner's letter "F" dated Jan. 13, 1877,—a certified copy of which said letter is hereto attached, marked Exhibit "A" and made a part hereof for reference; which said selection was duly approved and verified by the register and receiver of the United States land office at Salina, Kansas; that a copy of said selection approved and verified by the United States Land Office is hereto attached, marked Exhibit "B" and made a part hereof for reference; that thereafter and on Jan. 10, 1884, the said Missouri, Kansas & Texas Railway Company, relying upon the validity of said selection sold said land to one I. N. McCreery of Parsons, Kansas, and made, executed and delivered to said McCreery contracts for each of said pieces of land; that on the same day, the said McCreery, for a valuable consideration to him paid, assigned both the said contracts to this defendant and that on September 5, 1884, this defendant paid the full purchase price to the said Missouri, Kansas & Texas Railway Company for said land and received from it a warranty deed for the same and that in the purchase of said land, he relied upon the validity of said selection so made as aforesaid, by the Missouri, Kansas & Texas Railway Company; and thereafter this defendant still believing and relying upon the validity of said selection and knowing the same had not been cancelled, set aside or questioned at that time, sold and conveyed the same to one, W. E. Burchmore by deed of general warranty, September 6, 1884, and the said Burchmore conveyed the same to one O. C. Price by deed of quitclaim, Jan. 15, 1885, and the said O. C. Price and wife conveyed said land by deed of general warranty to the plaintiff in this action, Jan. 15, 1885, as

alleged in plaintiff's petition, and in said several sales
18 and conveyance of said land, the said selection so made by the Missouri, Kansas & Texas Railway Company, was in full force and effect and was unquestioned by the Government or any one else, and was relied upon by each and all of the several grantees and grantors mentioned in said several deeds and said selection remained in full force and effect unquestioned up to May 13, 1886, when by the Commissioner's letter of that date an attempt was made by the Commissioner of the General Land Office to cancel said selection, but this defendant avers the fact to be that the plaintiff had become the owner of the land Jan. 15, 1885, and at the time he became the owner of the land said selection was in full force and effect; that the said plaintiff nor any of the several grantees or grantors mentioned in the several deeds set up in petition of plaintiff knew or had any reason to know of any defect in the selection made by the Missouri, Kansas & Texas Railway Company, or knew or had any reason to know why said selection was not perfectly valid; and this defendant further alleges and shows to the court that by said selection said Missouri, Kansas & Texas Railway Company became the legal and equitable owner of said land and had a perfect right at any time before same was cancelled to sell and convey the same, and that its contract of sale and conveyance was a valid transfer of said land, and that the said Lee Clark took from the Missouri, Kansas & Texas Railway Company a good and indefeasible title to said land and at the time he sold and conveyed the same to said Burchmore, he had the right to sell and convey the same, and his deed of conveyance conveyed to the said Burchmore a good and indefeasible title to said land, and that the deed made by the said Burchmore to the said Price conveyed to the said Price a good and indefeasible title to said land and that the deed made by the said Price to the said Herrington — a good and indefeasible title to said lands. And this
19 defendant further alleges and shows to the court that the attempt of cancellation of the selection made by Commissioner's letter of May 13, 1886, did not operate to cancel said selection and did not operate to divest the said plaintiff of the title he had acquired to said land, but that said attempt of cancellation was absolutely void.

And this defendant further alleges and shows to the court that it is beyond the power of the Commissioner of the General Land Office, or any executive officer of the Government, to cancel said selection of said lands so made by the Missouri, Kansas & Texas Railway Company as aforesaid, after the same had in good faith and for a valuable consideration been sold and conveyed by the Missouri, Kansas & Texas Railway Company; and this defendant further alleges and shows to the court that the said plaintiff has never been ousted of his right to the possession of said land; that if he has abandoned the same he did it voluntarily, or at the request of a pretended owner, who had no valid title thereto whatever, and that he could not in reality have been compelled to surrender his possession of the same; that the said plaintiff now has the legal title and right of possession

to said land, and can assert the same successfully in court whenever he sees fit to do so.

Wherefore, the defendant demands judgment; that his action be dismissed and that he recover his costs hereof.

T. N. SEDGWICK,
Attorney for Defendant.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
"F." WASHINGTON, D. C., *January* 13, 1877.

Register and receiver, Salina, Kansas.

20 GENTLEMEN: I have examined the case of homestead entry No. 237 made June 21, 1863, by William M. Walter for the south half of the northwest quarter and the north half of the southwest quarter of section 22–15–5 east, which entry was cancelled October 7, 1875, for abandonment.

The tract is within the indemnity limits of the grant made by the act of July 26, 1866 to the Missouri, Kansas & Texas Railway Company, the right of which attached December 3, 1866, the date of filing map of definite location of the road. This was long subsequent to the abandonment by Walter of his homestead claim, as shown by his affidavit dated December 15, 1876, and as no other claim for these tracts appears of record in this office, the same inures to the grant, and the Missouri, Kansas & Texas Railway Company will be permitted to select same.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

I hereby certify that the copy attached hereto is a true and correct copy of a letter of the Hon. Commissioner of the Gen. Land Office addressed to the register and receiver of the U. S. land office at Salina, Kansas, under date of Jan. 13, 1877, and that the original letter referred to is now on file in this office.

J. M. HODGE, *Register.*

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 23*rd*, 1890.

I, Lewis A. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy is a true and literal ex-
21 emplification of a list of selections made by the Missouri, Kansas & Texas Railway Company on October 22, 1877, and certified by the district officers at Salina, Kansas, the 22nd day of October, 1877, as shown by the original list on file in this office, with all the endorsements thereon.

In testimony whereof, I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] LEWIS A. GROFF,
Commissioner of General Land Office.

The Union Trust Company of New York, trustee of Missouri, Kansas & Texas railway; William Bond, general manager.

Land department: A. M. Sommers, land commissioner; N. S. Goss, land attorneys.

EMPORIA, KANSAS, *October* 20, 1877.

I hereby certify that N. S. Goss is the duly appointed land attorney for the Missouri, Kansas & Texas Railway Company, and as such, is empowered and authorized to select lands, attend to and transact any business arising before the United States land offices in the State under their grants, acts of Congress approved March 3, 1863, July 1, 1864 and July 26, 1866.

In witness whereof I have hereunto signed my name and affixed the seal of said railway company.

[SEAL.] A. M. SOMMERS,
Land Commissioner.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
LAND DEPARTMENT,
EMPORIA, KANSAS, *October* 22, 1877.

Register and receiver U. S. land office, Salina, Kansas:

22 The Missouri, Kansas & Texas Railway Company, late Union Pacific Railway Company, Southern branch, under and by virtue of the acts of Congress entitled, "An act making an additional grant of lands to the State of Kansas to aid in the construction of a Southern railroad and telegraph lines" approved March 3, 1863, and July 1, 1864, and an act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific and telegraph from Fort Riley, Kansas, to Ft. Smith, Arkansas, approved July 26, 1866, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office hereby makes and files the following list of selections of public lands, claimed by the said company, as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said acts of Congress, and the location of the line of route of said company being for lands heretofore applied — but rejected on account of supposed adverse claims or conflict with other railroad grants, the selections being particularly described as follows, to wit:

Railroad List.

No.	Part of sect.	Sect.	Twp.	Range.	Acres.	Remarks.
—	S. ½ N. W. ¼ and N. ½ S. W. ¼.	22	16 S.	5 E.	160	6-32 Selection cancelled July 21, '86. See to R. & R. D. W. 70. C. S. B.

Selection posted Jan. 4, 1878. J. W. S.

STATE OF KANSAS, } ss:
County of Saline, }

I, N. S. Goss, being duly sworn depose and say that I am the land attorney of the Missouri, Kansas & Texas Railway Company, formerly Union Pacific Railway Company Southern
23 branch; that the foregoing list of lands which I hereby select, is a correct list of a portion of the public lands claimed by the said Missouri, Kansas & Texas Railway Company as inuring to them to aid in the construction of the road from Junction City, Kansas to the southern boundary of the State for which a grant of land was made by the acts of Congress approved March 3, 1863, July 1, 1864, and July 26, 1866; that the said lands are vacant, unappropriated and are not interdicted mineral or reserved lands and are of the character contemplated by the grant, being within the limits of twenty (20) miles on each side of the line of route, as heretofore applied for but rejected on account of supposed adverse claims or conflict with other railroad grants.

N. S. GOSS,
Land Attorney.

M., K. & T. R'y Co.

Subscribed and sworn to before me this 22nd day of October, 1877.

T. L. BOND, *Register.*

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *October* 22, 1877.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Missouri, Kansas & Texas Railway Company, formerly Union Pacific Railway Company Southern branch, under the grant to the State of Kansas, by the act of Congress approved March 3, 1863, July 1, 1864 and July 26, 1866 and selected by N. S. Goss, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved and that the whole of said lands are surveyed public lands of the United States and
24 within the limits of twenty (20) miles on each side, and that the same are not nor is any part thereof, returned and denominated as mineral land or lands nor claimed as swamp lands,

nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or recorded in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by act of Congress, approved July 1, 1864, and contemplated by the circular of instructions dated Jan. 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices and that the said company have paid to the undersigned, the receiver, the full sum of two ($2.00) dollars in full payment and discharge of said fees.

T. L. BOND, *Register.*
D. R. WAGSTAFF, *Receiver.*

And thereafter, and within due time, the plaintiff filed his reply to said answer, which said reply is in words and figures as follows, to wit:

(Title omitted.)

Comes now the said Monroe D. Herington and for reply to the answer of the said Lee Clark, defendant herein, says:

1. That he denies each and every allegation in said answer contained.

2. And for a second and further reply this plaintiff says: That the said land did not pass to the said Missouri, Kansas and Texas Railway Company, known as the Southern branch of the Union Pacific, under the grant named in said answer, nor did any part of it, and the Missouri, Kansas and Texas Railway Company never had any right, title or interest in or to said land and that none was conveyed by it to the said David Kelso or to Lee Clark, nor did any title or interest in or to said lands pass by any subsequent conveyances named in said answer. That said selection mentioned in said answer was set aside and cancelled by proper authority of the Government of the United States and that said pretended selection was unauthorized in law and conferred upon the said Missouri, Kansas and Texas Railway Company no right or interest whatever in said lands.

J. C. & C. R. MAHAN,
Att'ys for Plaintiff.

And thereafter the parties agreed upon the following statement of facts as the facts in this case, to wit:

(Title omitted.)

It is hereby stipulated by and between the plaintiff and defendant in the above-entitled cause that the same shall be tried to the court without a jury upon the following agreed statement of facts, which are hereby agreed upon and admitted to be true, and such other competent testimony as either party may offer on the trial of this cause:

I. That the Union Pacific Railway Company, Southern branch, was a corporation duly and legally organized and incorporated under and by virtue of the laws of the State of Kansas, and is the

same corporation mentioned and described in the acts of Congress of the United States entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch to the Union Pacific railway and telegraph from Fort Riley, Kansas to Fort Smith, Arkansas" approved July 26, 1866.

26 II. That afterwards, to wit, on the 31st day of March, 1870, the said Union Pacific Railway Company, Southern branch, was in accordance with the law changed in name to that of the Missouri, Kansas & Texas Railway Company, which change of name was legally made, and by which latter name the said Union Pacific Railway Company, Southern branch is, and ever since said 31st day of March, 1870, has been known, and thereupon the said Missouri, Kansas & Texas Railway Company became, was and still is by competent authority the legal and equitable successor and owner of all the benefits, rights and franchises contained in and provided by said act of Congress; and all the rights, property, grants, franchises of whatsoever name or character theretofore held, owned and enjoyed by the said Union Pacific Railway Company, Southern branch to the full and same extent the latter company did own, hold and enjoy, or could own, hold and enjoy either under the said act of Congress or any other act of Congress, or any act of the legislature of the State of Kansas.

III. That the line and route of said railway company was definitely fixed and located through the county of Morris in the State of Kansas to the southern boundary line of said State and opposite and parallel to the land described in the petition of the plaintiff herein, and maps thereof filed with the Secretary of the Interior on the 7th day of January, 1868 as contemplated and provided in said act of Congress of July 26, 1866.

IV. That in order to secure to the said railway company the full quantity of land granted by said acts of Congress, the said land described in plaintiff's petition together with other lands was withdrawn from market and from the operation of the homestead and pre-emption laws of the United States by the Secretary of the Interior as contemplated and provided in said act of Congress on

27 the 6th day of April, 1867, which was the date the register and receiver of the U. S. land office at Salina, Kansas received notice of such withdrawal.

V. That said railway corporation duly accepted the provisions and benefits of the said act of Congress on the 6th day of December, 1866, and in pursuance thereof did proceed with the construction and completion of its said railway, and on the 6th day of June, 1870 had constructed and completed its railway as contemplated and provided from Fort Riley as aforesaid to the south boundary line of the State of Kansas.

VI. That the land described in said plaintiff's petition is situated within the indemnity limits of the grant to said railway corporation as provided by said act of Congress, and is within twenty miles from the line and route of said railway so definitely fixed, located and constructed as aforesaid.

VII. That in lieu of an equal amount of land lost to said railway

company by reason of the attachment of homestead or pre-emption right thereto as provided by said act of Congress approved July 26, 1866 when the line of said railway company was definitely located, the said railway company under the proper rules of the Department of the Interior did on October 22nd, 1877 cause to be selected, and did select, the tracts of land described in the plaintiff's petition herein, which selection was in accordance with letter "F" of the Commissioner of the General Land Office, dated January 13, 1877, a copy of which letter is hereto attached for reference.

VIII. That at the time said land was so selected by the said railway company as aforesaid, it was unimproved and without actual occupation until after September 5, 1884.

IX. That on June 2nd, 1863, one Wm. M. Walters made homestead entry # 237 of the land described in plaintiff's petition
28 and received his certificate therefor; and on October 7, 1875 his said entry was cancelled for abandonment, by Commissioner's letter "C" of said date, a copy of which said letter is hereto attached for reference.

X. That said Wm. M. Walters abandoned said land prior to December 3, 1866, as appears by his affidavit dated December 15, 1876, a copy of which affidavit is hereto attached for reference.

XI. That on the 10th day of June, 1884, the said Missouri, Kansas and Texas Railway Company sold said land to I. N. McCreery of Parsons, Kansas and gave him written contracts therefor, which he, the said I. N. McCreery, on the same day assigned to the defendant herein Lee Clark.

XII. That the said defendant, Lee Clark, paid the full purchase price of said land to said railway company and on September 5, 1884 received from the said railway company a warranty deed for the same.

XIII. That on September 6, 1884, said defendant Lee Clark and Helen Clark, his wife, for the consideration of $1,600.00 sold said land to one Wm. E. Birchmore and conveyed the same to him by warranty deed as shown in plaintiff's petition; and the said Wm. E. Birchmore thereupon took possession of the said land and enclosed the same with a fence together with other lands. And of the consideration named in said deed of said Clark and wife to said Birchmore, he the said Birchmore, paid the sum of $600.00 cash, and gave to said Clark a mortgage of $1,000.00 upon said land; and thereafter and upon the 25th day of November, 1885, the plaintiff in this action paid said sum of $1,000.00 and $30.00 interest thereon to the defendant in satisfaction of said purchase-money mortgage.

XIV. That on January 15, 1885, the said Wm. E. Birchmore for a valuable consideration to him in hand paid by one Orlando C. Price sold and by his deed of quitclaim (without covenants of bargain and sale of warranty) conveyed said land to said Price
29 as alleged in plaintiff's petition.

XV. That on the 7th day of January, 1885, the said Orlando C. Price and Minnie J. Price, his wife, for a valuable consideration sold and conveyed said land to the plaintiff, Monroe D. Herrington by

their warranty deed as shown by Exhibit "C" attached to plaintiff's petition.

XVI. That the several grantees subsequent to the defendant each in turn went into the actual possession of said land and remained in possession thereof until July 31, 1886.

XVII. That on July 31, 1886, one E. M. Cox made homestead entry #24132 for said land, which he afterwards cancelled by relinquishment March 10, 1888. That at the time of making said homestead entry he took actual and forcible possession of the land.

XVIII. That on March 10, 1888, one Byron L. Herrington made homestead entry #24381 for said land, which entry he afterwards cancelled by relinquishment on July 28, 1888.

XIX. That on July 28, 1888, one E. M. Cox made decla-tory statement #8666 claiming settlement on the said land on July 27, 1888 and afterwards made final cash proof, and final certificate #5472 issued to him on July 26, 1889.

XX. That said Lee Clark and each subsequent grantee to the defendant herein at the time of his purchase assumed and believed the M. K. & T. R'y Co. had a good title to the land.

XXI. That on July 21, 1886, the said selection of the said land by said Missouri, Kansas & Texas Railway Company was cancelled by order of Commissioner of the General Land Office contained in his letter "F" dated May 13, 1886, copy of which is hereto attached for reference; of which said order of cancellation due notice was given the said railway company and time given it in which to appeal. No appeal was ever taken by said company.

30 XXII. That no notice was ever given to the said defendant Lee Clark, or any of his grantees by the plaintiff of any contest over said land in the U. S. land office.

XXIII. That no legal proceedings of any kind were ever commenced by said E. M. Cox against the plaintiff to oust or evict him from the possession of said land.

XXIV. That upon the selection of said land by said Missouri, Kansas & Texas Railway Company on Octobor 22nd, 1877, the amount of the fees therefor was duly paid by said railway company, and a certificate of said selection was duly issued to it.

XXV. That said selection remained in full force and unquestioned by either government or any one else from said October 22, 1877 to May 13, 1886, when the same was ordered cancelled by Commissioner's letter "F" dated May 13, 1886, as appears in statement XXI.

XXVI. That the plaintiff is the assignee of the said Wm. E. Birchmore of all his rights under the deed of the defendant to the said Wm. E. Birchmore, including any breach of the covenants therein contained.

XXVII. That the only possession ever had under any of the conveyances named herein by any of the grantees of the said defendant was by fencing said land and using the same for pasturing cattle.

JNO. H. MAHAN,
Attorney for Plaintiff.
T. N. SEDGWICK,
Attorney for Defendant.

"C." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1875.

31 Register & receiver, Salina, Kansas.

GENTLEMEN: Referring to your letter of Sept. 28, 1875, in which you state that the following-named claimant under the homestead law has permitted the period of seven years allowed by law for making the required proof of settlement and cultivation to expire without making such proof, that he has been notified by you in accordance with my circular of December 20, 1873, and that he has failed to show cause why his claim should not be declared forfeited and his entry canceled.

I have to state that as the party has failed to comply with the requirements of the law, his entry has this day been canceled on our files and records. You will, therefore, note the cancel-ation on you records and thereafter promptly advise us of the fact. The case referred to in the foregoing as canceled is the following, viz: Homestead entry # 237 by William M. Walter, made at Junction City, June 2nd, 1863 for the south half northwest quarter and north half southwest quarter of section 22, 15, 5 east.

Very respectfully, S. S. BURDETT,
Commissioner.

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *July 22nd*, 1890.

I hereby certify that the above is a true and correct copy of Commissioner's letter "C" of Oct. 7th, 1875, now on file in this office.

C. W. BANKS, *Receiver.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
32 "F." WASHINGTON, D. C., *January* 13, 1877.

Register & receiver, Salina, Kansas.

GENTLEMEN: I have examined the case of homestead entry # 237 made June 2, 1863 by William M. Walters for the south half northwest quarter and north half southwest quarter section 22–15 S. R. 5 E. which entry was canceled October 7, 1875 for abandonment. The tract is within the indemnity limits of the grant made by the act of July 26, 1866 to the Missouri, Kansas and Texas Railway Company the right of which attached December 3, 1866, the date of filing map of definite location of the road.

This was long subsequent to the abandonment by Walter of his homestead claim as shown by his affidavit dated December 15, 1876, and as no other claim for these tracts appears of record in this office, the same inures to the grant and the Missouri, Kansas & Texas Railway Company will be permitted to select the same.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *July* 22, 1890.

I hereby certify that the above is a true and correct copy of Commissioner's letter "F" of January 13, 1877, now on file in this office.

C. W. BANKS, *Receiver.*

33 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
"F." WASHINGTON, D. C., *May* 13, 1886.

Register & receiver, Salina, Kansas.

GENTLEMEN: I have considered the application of E. M. Cox to make a homestead entry for the south half northwest quarter and the north half southwest quarter section 22, tp. 15 S. R. 5 E. His application was presented Sept. 7, 1885, but was rejected by you the same day for the reason that the land was withdrawn for the Mo. Kan. and Texas R'y Co.

The land is situated in the indemnity limits of the grant to said company, and the letter of March 19, 1867, directing a withdrawal of lands for the benefit of the same was received at the local office, April 6, 1867.

The records of this office show that Wm. M. Walter filed preemption D. S. # 702 for the northwest quarter of the section July 22nd, 1861, alleging settlement the 20th of the same month. He filed D. S. # 1109 for the tracts in question June 1, 1863 alleging settlement May 2, 1863. He made homestead entry # 237 for the same tracts June 2, 1863. This entry was canceled Oct. 7, 1875 for non-completion within seven years from its date. The company selected the tracts Oct. 22nd, 1877 under the act of July 26, 1877, but patent has not issued. The tracts are situated in the limits of the grant to the Union Pacific R'y Co. Kansas division, which antedates the grant to the former company and being in an even-numbered section were reserved to the United States for disposal at double minimum rates for the purpose of reimbursing the Government for the lands granted the senior company.

34 More-ver the filings and homestead entry of Walters were all made prior to the former grant, and his entry was not canceled until after the withdrawal therefor, while his filings remain of record to the present time.

The company did not designate any tracts lost to the grant for which the tracts in question were selected. For the foregoing reasons it is held that the tracts were excluded from the operation of the grant of the Mo. Kan. & Texas R'y Co. The selection of the same by the company is therefore held for cancel-ation subject to appeal within sixty days. Should this decision become final the application of Mr. Cox will be allowed. The resident attorneys for the company will be notified from this office.

Very respectfully, S. M. STOCKSLAGER,
Acting Commissioner.

I hereby certify that the above is a true and correct copy of Commissioner's letter "F" of May 13, 1866.

C. W. BANKS, *Receiver.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1891.

I, Lewis H. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy of the affidavit of Wm. Walter is a true and literal exemplification of the original affidavit now on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

35

LEWIS H. GROFF,
Commissioner of the Gen'l Land Office.

STATE OF KANSAS, }
County of Morris, } ss:

On this 15th day of December, A. D. 1876 before me a notary public in and for said county and State personally appeared Wm. M. Walters of lawful age to me well known, who upon his oath says: I am the identical Wm. M. Walters that made homestead entry #237, June 2, 1863 at the U. S. land office on the south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15 of range 5, situated in the Salina land district, Kansas; that I settled on said land in 1862, broke about twenty-five acres, built a small house, fenced the land broken, and continued to cultivate the same, and reside thereon up to the first of April, 1865, when I abandoned the land, moved the house and fence away, and have since never returned to improve or claim the same, and I now voluntarily relinquish to the United States any claim I may have thereto by reason of said homestead entry, and authorize the cancellation of the same.

WM. M. WALTERS.

Subscribed and sworn to before me.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.]

E. S. BERTRAM,
Notary Public.

Afterwards, to wit, and at the February 1899 term of the district court of Labette county, Kansas, said cause came on for hearing and was submitted to the court upon the agreed statement of

36

facts, said agreed statement of facts comprising all of the evidence that was submitted to the court. And thereupon, after argument of counsel for both sides, the court took said case under consideration until the next regular term thereof.

And thereafter, and at the regular May 1899 term of said court, and on the 20th day of May, 1899, said cause came on for hearing

before the court upon the agreed statement of facts at the last previous term submitted to the court; and the court, having fully considered the same and being fully advised in the premises, and after argument of counsel for both sides, finds generally in favor of the plaintiff and against the defendant, and that the plaintiff is entitled to recover of the defendant the sum of $3,032.28, together with the costs of this action.

And thereupon, and on the same day and in open court, the defendant filed its motion for a new trial, of which said motion the following is an exact copy, to wit:

(Title omitted.)

Comes now the defendant in the above-entitled cause and moves the court to set aside the judgment rendered herein, and grant the defendant a new trial for the following reasons, to wit:

1. That the decision of the court is not sustained by sufficient evidence.
2. That the decision of the court is against the evidence.
3. Error in assessment of the amount of recovery, the same being too large and excessive.

37 4. That the decision of the court is contrary to law.

5. Error of law occurring at the trial and excepted to by the defendant at the time.

T. N. SEDGWICK,
Attorney for Defendant.

Which said motion was immediately taken up by the court and, after argument of counsel for both sides and due consideration, was by the court overruled, to which ruling of the court the defendant at the time duly excepted and excepts.

And thereupon the court caused its judgment to be entered upon the journal, a copy of which said judgment of the court as entered upon the journal is as follows:

(Title omitted.)

And now on this 20th day of May, 1899, at the regular May 1899 term of this court, the above cause having been regularly reached in its regular order was called for hearing upon the agreed statement of facts heretofore introduced at a previous term of court. And the court being fully advised in the premises, find generally in favor of the plaintiff and against the defendant.

It is thereupon considered, ordered and adjudged by the court that the plaintiff do have and recover of and against the defendant the sum of $3,032.28, together with the costs of this action duly taxed at $—. And hereof let execution issue.

To all of which the defendant at the time duly excepted.

And thereupon the defendant, within due time, filed his motion for a new trial, which motion was immediately taken up by the

court and, after argument of counsel for both sides, was by the
38 court overruled, to which action of the court in overruling said motion for a new trial the defendant at the time duly excepted.

Thereupon the defendant was given sixty days in which to make and serve a case-made for the supreme court, the defendant twenty days thereafter in which to suggest amendments to the same, the said case-made to be settled and signed by the court upon five days' notice.

And thereafter, and for good cause shown, the court extended the time in which to make and serve a case-made for the supreme court to August 10th, 1899, which order extending the time to make and serve said case-made is as follows, to wit:

(Title omitted.)

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to *to* suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

The above and foregoing comprises all of the proceedings had in said cause at the February and May 1899 terms of the district court of Labette county, Kansas, where the same was pending.

T. N. SEDGWICK,
Attorney for Defendant.

39 In the Supreme Court of Labette County, Kansas.

M. D. HERRINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

Amendments to Case-made.

The said plaintiff suggests that the proposed case-made of the last trial be amended as follows, to wit:—

First.

On page 6, by changing Birchman to Birchmore, at the two places indicated by pencil marks.

Second.

That in section 12 of the agreed statement of facts, page 22, $1,800.00 be changed to $1,600.00.

These are the only suggestions I have to offer.

J. D. McCLEVERTY.

AUGUST 16, 1899.

T. N. Sedgwick, Esq., Parsons, Kans.

DEAR SIR: I return you herewith your files in Herrington vs. Clark; also the original court files and the proposed case-made. I make a couple of suggestions which are so simple that I have no doubt you will at once make the changes, and feeling confident of this, I sign your statement as prepared, that I have no suggestion to make. I do not date either of the statements signed by me
40 leaving that for you to do, and you may insert such date as you deem advisable, and so far as I am concerned you are at liberty to send the record to Judge Skidmore by mail and save yourself any further trouble in that respect.

You will notice that the name Birchman was written that way originally but changed to Birchmore.

I desire also to call your attention to the fact that the journal entry of judgment ought to recite that the judgment should bear interest at the rate of 7 % per annum, and I would be glad if you would write the clerk and direct him to add those words to the journal entry. Of course if this is not done the interest would only be six per cent. (In lead pencil—Be kind enough to send papers to clerk.)

Very respectfully, J. D. McCLEVERTY.

Service of the above and foregoing case-made is hereby accepted by me this 9th day of August, 1899.

J. D. McCLEVERTY,
Attorney for Plaintiff.

The above and foregoing case-made has been carefully examined by me and I find the same correct, and hereby return the same to the attorney for the defendant without making any suggestions of amendment thereto, this 16th day of August, 1899.

J. D. McCLEVERTY,
Attorney for Plaintiff.

41 STATE OF KANSAS, } ss:
County of Labette, }

I, the undersigned, judge of the district court of Labette county, Kansas, hereby certify that the foregoing was presented to me as a case-made in the action above entitled, the plaintiff appearing by his attorney J. D. McCleverty and the defendant appearing by his attorney, T. N. Sedgwick, and no amendments being suggested, I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at Oswego in Labette county, Kansas, this 25th day of Oct., 1899.

A. H. SKIDMORE,
District Judge.

[SEAL.]

Attest: JOHN MAYER,
Clerk District Court,
By KATE HOAGLAND, *Deputy.*

Filed Nov. 9, 1899. D. A. VALENTINE,
Clerk Supreme Court.

42 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for costs, which, with the endorsements thereon is in the words and figures as follows, to wit:

43 In the Supreme Court of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said defendant in error, or to the officers of this court herein. And in default of payment by said plaintiff in error of said costs, and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

E. R. STEVENS.

(Endorsed on back:) 11637. Lee Clark *vs.* Monroe D. Herrington. Bond for costs. Approved and filed Nov. 9, 1899. D. A. Valentine, clerk supreme court. This bond is perfectly good. —— ——, attorney for plaintiff in error.

44 And afterward, on the 13th day of November, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas, an entry of appearance and waiver of the issuance and service of summons in error, which with the endorsements thereon is in the words and figures as follows, to wit:

45 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Entry of Appearance.

I hereby enter the appearance of the defendant in error in the above cause, and waive the issuance and service of a summons in error upon him in said cause.

J. D. McCLEVERTY,
Attorney of Record for Defendant in Error.

(Endorsed on back as follows:) 11637. Clark *vs.* Herington. Waiver of summons. Filed Nov. 12, 1898. D. A. Valentine, clerk supreme court.

46 And be it further remembered, that on the 1st day of March, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R.

Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:

47 *Journal Entry of Assignment.*

The following causes were ordered assigned for hearing at the March 1900 session of this court:

CLARK
vs.
HERINGTON. } No. 11637.

48 And afterwards, on the 11th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, proof of service of the brief of plaintiff in error, which with the endorsements thereon is in the words and figures as follows, to wit:

49 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Received of T. N. Sedgwick, attorney for plaintiff in error in the above-entitled cause, four copies of the brief of said plaintiff in error, this 7th day of April, 1900.

J. D. McCLEVERTY,
Attorney for Defendant in Error.

(Endorsed on back as follows:) 11637—Lee Clark, *vs.* Monroe D. Herington. Proof of service of pl'ff's brief. Filed Apr. 11, 1900. D. A. Valentine, clerk supreme court.

50 Be it further remembered, that on the 3rd day of May, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

51 *Journal Entry of Continuance.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

On motion of David Martin, attorney for def't in error, it is ordered that the further hearing of this cause be continued to the October 1900 session of this court.

52 And afterwards, on the 5th day of May, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a stipulation, which, with the endorsements thereon, is in the words and figures as follows, to wit:

53 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Stipulation.

It is agreed that this case may be passed to the June 1900 sitting of this court with leave to either party to file brief which may be deemed proper in the case, giving at least ten days' written notice thereof to the other party before the hearing.

T. N. SEDGWICK,
Attorney for Plaintiff in Error.
DAVID MARTIN,
Attorney for Defendant in Error.

Topeka, Kansas, May 2, 1900.

(Endorsed on back as follows:) No. 11637. Lee Clark *vs.* Monroe D. Herington. Stipulation to pass to June 1900 sitting. Filed May 5, 1900. D. A. Valentine, clerk supreme court.

54 And afterwards on the 21st day of May, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a certified copy of an order of extension of time to make case for the supreme court, which certified copy of said order with the endorsements thereon is in the words and figures as follows, to wit:

55 In the District Court of Labette County, Kansas.

MONROE D. HERRINGTON, Plaintiff,
vs.
LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed: 4177.—In the district court of Labette county, Kansas. Monroe D. Herrington, plaintiff, *vs.* Lee Clark, defendant.—Extension of time to make case.—Filed July 14, 1899, John Mayer, clerk district court.

STATE OF KANSAS, } ss:
Labette County, }

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order of extension of time to make case—filed in the case of Herrington *vs.* Clark, No. 4177, as the same remains on file and of record in my office.

56 Witness my hand and the seal of said court this 14th day of May A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court,
Labette County, Kansas.

(Endorsed on back as follows:) 11637. Monroe D. Herington *vs.* Lee Clark. Certified copy of allowance of time to file case-made. Filed May 21, 1900. D. A. Valentine, clerk supreme court.

57 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a motion to dismiss, which, with the endorsements thereon, is in the words and figures as follows, to wit:

58 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Motion to Dismiss.

And now comes the defendant in error, Monroe D. Herington, appearing specially for the purposes of this motion only, and moves the court to dismiss the proceeding in error on the part of the defendant in error, Lee Clark, and as grounds for this motion this defendant in error says:

1. This cause is brought to this court not upon a certified transcript of the record, but upon a so-called case-made which is insufficient and void.

2. The case-made was not served within the time originally allowed by the court (60 days from May 20, 1899), and it does not appear that the time was extended before the expiration of said 60 days. (Pp. 31–32.)

3. It does not appear that said case-made was settled by or before the judge who tried the cause.

4. It appears from said case-made that the proceedings included therein embody only those of the February and May terms, 1899, of said court, (p. 32), whereas the action was commenced April 20, 1889, (p. 1.) And it does not appear that other proceedings
59 important and necessary for the consideration of the questions involved were not had at and during other terms of the court than the two mentioned.

5. This action was originally commenced April 20, 1889 by said Monroe D. Herington against said Lee Clark to recover damages for the breach of certain covenants of warranty of the title of real estate, and the principal question involved was whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington, whether there was a breach of the covenants or not, and if there was a breach then the amount of damages recoverable. Said cause was tried in the district court on an agreed statement of facts and some other evidence October 29, 1891, and resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted a proceeding in error in this court, (No. 8249), which on April 11, 1896 reversed said judgment and held, decided and adjudged that said Lee Clark had no title to the land when he made the said covenants to said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court remanded the cause to the district court for a trial and determination of the amount of damages which said Monroe D. Herington had sustained. (56 Kan. 644.)

Notwithstanding the terms of said judgment of this court, however, when the cause came on again for trial in the district court that tribunal entirely ignored and disregarded the judgment of this court, and again rendered a judgment in favor of the said Lee Clark; but the said Monroe D. Herington prosecuted another proceeding in error in this court, (No. 10909), which on December 10, 1898 reversed said judgment and again held, decided and adjudged that said Lee Clark had no title to said land when he made the said covenants to said Monroe D. Herington, and that the
60 latter had been evicted by title paramount, and this court again remanded the cause to the district court for the determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. (55 Pac. Rep. 462.)

On the second remanding of said cause the said trial court obeyed the mandate, and upon the agreed statement of facts, introduced on each and all of said trials, found and adjudged the damages to said Monroe D. Herington to be $3,032.28 in accordance with the rule laid down by this court in its last decision of this case.

But notwithstanding the foregoing facts and the expressed terms of the judgments and opinions of this court in this cause, the present proceeding in error is not prosecuted for the purpose of challenging the amount or measure of damages adjudged by the court, but only the matter relating to the title and the eviction, which questions have already been twice adjudged adversely to the said Lee Clark, all of said proceedings in error having been in this cause, and there is nothing to adjudicate upon the present proceeding in error, prosecuted by the said Lee Clark, except what has been already twice adjudicated by this court.

The records in said former proceedings in error, including the judgments and mandates of this court therein, and other evidence, will be offered on the hearing of this motion.

DAVID MARTIN,
Attorney for Defendant in Error for this Motion Only.

(Endorsed on back as follows:) No. 11637—Lee Clark—*vs.*—Monroe D. Herington. Motion to dismiss. Filed May 21, 1900. D. A. Valentine, clerk supreme court. David Martin, attorney for defendant in error for this motion only.

61 And afterwards, on the 6th day of June, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, an affidavit of John Mayer, clerk of the district court of Labette county, Kansas, together with a certified copy of the order of extension of time in which to make case for the supreme court, attached thereto, which affidavit and certified copy of order with the endorsements thereon are in words and figures as follows, to wit:—

62 In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

STATE OF KANSAS,
County of Labette, } ss:

John Mayer, of lawful age, being first duly sworn, upon oath deposes and says that he is the clerk of the district court of Labette county, Kansas; that he has been such clerk for about three years last past; that he was such clerk of the district court in February and May, 1899; that he is acquainted with Hon. A. H. Skidmore, the judge of said district court; that he is also acquainted with the case of Monroe D. Herington *vs.* Lee Clark, and was present in court when all the proceedings were had in said case at the February and May 1899 terms of said court; that at both the February and May 1899 terms of said court the Hon. A. H. Skidmore presided as district judge, and was the presiding judge before whom the case of Monroe D. Herington *vs.* Lee Clark was heard and tried, and before whom all the proceedings were had in said cause at said February and May 1899 terms of said court; that he is the same A. H. Skidmore who allowed, settled and signed the case-made, and at the time of allowing, settling and signing said case-made he was still the duly elected, qualified and acting district judge of the district court of Labette county, Kansas, and the same judge before whom said case of Monroe D. Herington *vs.* Lee Clark was tried at
63 the February and May terms of said court. And further affiant saith not.

[SEAL.] JOHN MAYER.

Subscribed and sworn to before me this 31 day of May, A. D. 1900.

L. W. CRAIN,
Probate Judge Probate Judge *of Labette County, Kansas.*

My commission expires ——.

64 In the District Court of Labette County, Kansas.

MONROE D. HERRINGTON, Plaintiff, vs. LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

Be it remembered, that heretofore to wit, on the 14 day of July 1899, the following proceedings were had and entered upon the journal of this court in the above cause to wit:

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed as follows: No. 4177. In the district court of Labette county, Kansas. Monroe D. Herrington, plaintiff, *vs.* Lee Clark, defendant. Extension of time to make case. Filed Jul- 14, 1899. John Mayer, clerk district court.

STATE OF KANSAS, *Labette County,* } *ss:*

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order made by court of extension of time to make case-made in the case of Monroe D. Herington *vs.* Lee Clark, No 4177, as the same remains on file and of record in my
65 office.

Witness my hand and the seal of said court this 2nd day of June, A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court, Labette County, Kansas.

(Endorsed on back as follows:) No. 11637. In the supreme court. Monroe D. Herington *vs.* Lee Clark. Affidavit and court order. Filed Jun- 6, 1900. D. A. Valentine, clerk supreme court.

66 And on the same day, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:—

67 *Journal Entry of Submission of Motion to Dismiss.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes on to be heard the motion of defendant in error to dismiss this cause for the reasons set forth in said written motion filed herein; and thereupon said motion is submitted on brief of counsel for plaintiff in error and taken under advisement by the court.

68 And be it further remembered, that afterwards, on the 9th day of June, 1900, the same being one of the regular judicial days of the January, 1900, term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

69 *Journal Entry of Decision of Motion to Dismiss.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes on for decision the motion of defendant in error to dismiss this cause; and thereupon it is ordered that said motion be denied.

70 And be it further remembered, that afterwards, on the 27th day of June, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable Willaim R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

71 *Journal Entry Allowing Bill of Exceptions.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes defendant in error by David Martin, his attorney, and presents his bill of exceptions to the ruling and decision of this court on his motion to dismiss heretofore overruled and denied, and moves the court that said bill of exceptions be allowed and signed and that the same be filed and made a part of the record herein; and there-

upon it is ordered that said motion be sustained, and that the bill of exceptions of the defendant in error to the ruling of the court denying his motion to dismiss this cause be allowed and signed as prayed for, and that the same be filed and made a part of the record herein.

72 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, and made a part of the record herein, a bill of exceptions, which, with the endorsements thereon, is in the words and figures as follows, to wit:

73 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Bill of Exceptions.

Be it remembered that on May 21, 1900 the defendant in error filed his motion to dismiss this action, the same being in the words and figures following, to wit:

"In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Motion to Dismiss.

And now comes the defendant in error, Monroe D. Herington, appearing specially for the purposes of this motion only, and moves the court to dismiss the proceeding in error on the part of the defendant in error Lee Clark, and as ground for this motion this defendant in error says:

1. This cause is brought to this court not upon a certified transcript of the error, but upon a so-called case-made, which is insufficient and void.

2. The case-made was not served within the time originally allowed by the court, (60 days from May 20, 1899,) and it does not appear that the time was extended before the expiration of said 60 days. (Pp. 31–32.)

3. It does not appear that said case-made was settled by or before the judge who tried the cause.

74 4. It appears from said case-made that the proceedings included therein embody only those of the February and May terms, 1899, of said court, (p. 32,) whereas the action was commenced April 30, 1899, (p. 1.) And it does not appear that other proceedings, important and necessary for the considerations of the questions involved, were not had at and during other terms of the court than the two mentioned.

5. This action was originally commenced April 20, 1889, by said Monroe D. Herington against said Lee Clark, to recover damages for the breach of certain covenants of warranty of the title of real estate, and the principal question involved was whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington, whether there was a breach of the covenants or not, and if there was a breach then the amount of damages recoverable. Said cause was tried in the district court on an agreed statement of facts and some other evidence October 29, 1891 and resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted a proceeding in error in this court, (No. 8249,) which on April 11, 1896, reversed said judgment and held, decided and adjudged that said Lee Clark had no title to the land when he made the said covenants to the said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court remanded the cause to the district court for a trial and determination of the amount of damages which said Monroe D. Herington had sustained. (56 Kan., 644.)

Notwithstanding the terms of said judgment of this court, however, when the cause came on again for trial in the district court that tribunal entirely ignored and disregarded the judgment of this court, and again rendered a judgment in favor of the said Lee Clark; but the said Monroe D. Herington prosecuted another proceeding in error in this court (No. 10909,) which on December 10, 1898
75 reversed said judgment and again held, decided and adjudged that said Lee Clark had no title to said land when he made the said covenants to said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court again remanded the cause to the determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. (55 Pac. Rep., 462.)

On the second remanding of said cause the said trial court obeyed the mandate, and upon the agreed statement of facts, introduced on each and all of said trials, found and adjudged the damage to said Monroe D. Herington to be $3,032.28 in accordance with the rule laid down by this court in its last decision of this case.

But notwithstanding the foregoing facts and the expressed terms of the judgments and opinions of this court in this cause, the present proceeding in error is not prosecuted for the purpose of challenging the amount or measure of damages adjudged by the court but only the matter relating to the title and the eviction, which questions have already been twice adjudged adversely to the said Lee Clark, all of said proceedings in error having been in this cause, and there is nothing to adjudicate upon the present proceeding in error, prosecuted by the said Lee Clark, except what has been already twice adjudicated by this court.

The records in said former proceedings in error, including the judgments and mandates of this court therein, and other evidence, will be offered on the hearing of this motion.

DAVID MARTIN,

Attorney for Defendant in Error for this Motion Only."

The said motion came on for hearing before the court in open session at the June sitting of the January term, 1900, of the court, and in support of said motion the defendant in error, Monroe
76 D. Herington offered in evidence the records in cases No. 8249 and 10909 respectively in this court, which were former proceedings in error in this court in the same cause and controversy.

Said cause No. 8249 was filed in this court March 21, 1892, by said Monroe D. Herington against the said Lee Clark, for the purpose of reversing a judgment of the district court of Labette county, Kansas, rendered at the October term 1891. Said petition in error, except the exhibit, being as follows, to wit:

"In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Petition in Error.

The said Lee Clark, plaintiff in error, complains of the said Monroe D. Herington, defendant in error, for that the said defendant in error at the May 1899 term of the district court of Labette county, Kansas, recovered a judgment by the consideration of said court against the said plaintiff in error, in the sum of $3,032.28, together with the costs of the action, in a certain action then and there pending in said court wherein the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, a case-made embracing the judgment and all *in* proceedings in which case duly certified, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff in error avers that there is error in said record and proceedings in this, to wit:

1. The said court erred in holding and deciding that the evidence was sufficient to entitle the defendant in error, plaintiff below, to a judgment against the plaintiff in error, defendant below.
77 2. The said court erred in not deciding that the evidence was insufficient to sustain a judgment in favor of the plaintiff below and against the defendant below.
3. The said court erred in not rendering a judgment for the defendant below for costs.
4. The said court erred in overruling the motion of the defendant below for a new trial.
5. The said court erred in not sustaining the motion for a new trial, and in not granting the defendant below a new trial.
6. The said court erred in rendering a judgment for the plaintiff below instead of for the defendant below.

Wherefore, the plaintiff in error prays that said judgment be reversed and he be restored to all things which he has lost thereby.

T. N. SEDGWICK,
Attorney for Plaintiff in Error."

It appears from the petition in error and exhibit that the action was originally commenced April 20, 1889 by said Monroe D. Herington against said Lee Clark, to recover damages for the breach of certain covenants of warranty of title of real estate, and the questions involved were whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington; whether there was a breach of the covenant or not, and, if there was a breach then the amount of damages recoverable.

The pleadings appearing in said case No. 8249, were identical with the pleadings appearing in the present proceeding in error, and the agreed statement of facts identical with the agreed statement of facts appearing in the record of the present proceeding in error. (See pp. 20 to 28 both inclusive of the present proceeding in error.)

In the trial of said case at the October term 1891 of the district court of Labette county the proceedings in which trial appear
78 in case No. 8249, the said M. D. Herington introduced in evidence a patent for the land in controversy to Elbridge M. Cox, which patent was not introduced in evidence on the trial of the case in said district court which is brought up in the present proceeding in error, No. 11637. Said patent being in the words and figures following, to wit:

"*Certificate No.* 5472.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, Elbridge M. Cox, of Morris county, Kansas, has deposited in the General Land Office of the United States a certificate of the register of the land office at Salina, Kansas, whereby it appears that full payment has been made by the said Elbridge M. Cox according to the provisions of the act of Congress of the 24th of April 1880, entitled 'An act making further provision for the sale of the public lands' and the acts supplemental thereto for the south half of the northwest quarter, and the north half of the southwest quarter of section twenty-two, in township fifteen, south of range five (5) east of the sixth principal meridian, in Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Elbridge M. Cox.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Elbridge M. Cox, and to his heirs, the said tract above described, to have and to hold, the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Elbridge M. Cox, and to his heirs and assigns forever.

In testimony whereof, I Benjamin Harrison, President of the
79 United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fifteenth day of October in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN M:FARLAND,
Ass't Secretary.

J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded vol. 7 page 225."

But there was introduced in evidence in the last trial brought up in the proceeding in error No. 11637, a department certificate of affidavit of date March 3, 1891, which was not introduced in evidence in the trial, the proceedings of which appear in case No. 8249, said department certificate of affidavit being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1891.

I, Lewis H. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy of the affidavit of Wm. Walter is a true and literal exemplification of the original affidavit now on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

LEWIS H. GROFF,
Commissioner of the Gen'l Land Office."

"STATE OF KANSAS, } ss:
County of Morris, }

On this 15th day of December A. D. 1876 before me a notary public in and for said county and State personally appeared Wm.
80 M. Walters of lawful age to me well known, who upon his oath says: I am the identical Wm. M. Walters that made homestead entry # 237, June 2, 1863 at the U. S. land office on the south half of the northwest quarter of section 22, township 15 of range 5, situate in the Salina land district, Kansas; that I settled on said land in 1862, broke about twenty-five acres, built a small house, fenced the land broken, and continued to cultivate the same, and reside thereon up to the first of April 1865, when I abandoned the land, moved the house and fence away, and have since never returned to improve or claim the same, and I now voluntarily relinquish to the United States any claim I may have thereto by reason of said record homestead entry, and authorize the cancellation of the same.

WM. M. WALTERS.

Subscribed and sworn to before me. In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.] E. S. BERTRAM,
Notary Public."

And the foregoing were the only differences in the evidence introduced in said two trials appearing respectively in proceedings in error, Nos. 8249 and 11637.

Said trial at October term 1891 in the district court of Labette county, Kansas, resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted said proceeding in error in this court, No. 8249, and this court on April 11, 1896 reversed said judgment, and held, decided and adjudged that said Lee Clark had no title to the land when he made said covenants to said Monroe D. Herington, and the latter had been evicted by title paramount, and this court remanded the cause to said district court for trial and determination of the amount of damages which
81 the said Monroe D. Herington had sustained. The syllabus, statement and opinion of this court upon said petition in error, No. 8249, is truly reported in vol. 56 of Kansas Report at pages 644 to 652 inclusive, the same being as follows, to wit:

"MONROE D. HERINGTON
vs.
LEE CLARK. } No. 8249.

1. Public lands—Conflicting railroads grants.—The even-numbered sections within the place limits of the land grant to the Union Pacific Railway Company, Eastern division, were reserved by act of Congress and held for disposal only at double minimum rates. A part of the same was within the indemnity limits of the grant made to the State to aid in the construction of the Missouri, Kansas & Texas railway, but, being already reserved to the United States for a specific purpose, it was not subject to selection by the latter company to supply deficiencies existing within the place limits of its grant.
2. Title in the United States.—Until the lands within the indemnity limits were actually selected and specifically set apart under the direction of the Secretary of the Interior for indemnity purposes, the title thereto did not vest in the railway company, but remained in the United States and subject to its disposal.
3. Reservation—Ineffectual selection.—A selection for indemnity purposes by permission of the Commissioner of the General Land Office of lands reserved to the United States for another specific purpose is ineffectual, and does not preclude the Land Department thereafter devoting the lands to the purposes for which they were reserved.
4. Covenant of warranty—Paramount title.—In an action to recover upon a covenant of warranty, the general rule is that the grantee can yield possession only to a hostile assertion of a

paramount title; but where the title to the land in controversy is in the United States, and liable to entry and settlement
82 under the homestead laws of the Government to all who possess the proper qualifications, that, of itself, is such a hostile assertion of the paramount title as will authorize the grantee to voluntarily submit to it." (K. P. Rly. Co. *v.* Dunmeyer, 19 Kan. 539.)

Error from Labette district court.

Action by Monroe D. Herington to recover from Lee Clark on the covenants contained in a conveyance of a quarter section of land in Morris county.

It was tried upon an agreed statement of facts, among which the following appear: For the purposes of aiding the Union Pacific Railway Company, Southern branch, the name of which was duly changed to the Missouri, Kansas & Texas Railway Company, a grant of the public land was made by an act of Congress approved July 26, 1866. The line of the railway was definitely fixed opposite and parallel to the land in question and through to the southern boundary of the State on January 7, 1868. The railway company accepted the provisions of the act of Congress on December 6, 1866, and in pursuance thereof had constructed and completed its railway from Fort Riley to the southern line of the State on June 6, 1870. The land in question was within the indemnity limits of the grant made by act of Congress—that is, within 20 miles of the line and route of the railway. In lieu of an equal amount of land within the place limits lost to the railway company by reason of the attachment of homestead or pre-emption rights thereto, the railway company, under the proper rules of the Department of the Interior, did, on October 22, 1877, select the land in question, and at that time it was unoccupied and unimproved. The selection was made with the permission of the Commissioner of the General Land Office, and when it was made the company paid therefor the amount of fees required, and a certificate of the selection was duly issued, but a patent for the same was never issued to the company. This selection remained in full force and unquestioned until May 13,
83 1886, when it was canceled by order of the Commissioner of the General Land Office. The grounds upon which this cancellation was made were that the tract was situated within the limits of the grant to the Union Pacific Railway Company, Kansas division, which antedates the grant to the Missouri, Kansas & Texas Railway Company, and, being in an even-numbered section, was reserved to the United States for disposal at double minimum rates, for the purpose of reimbursing the Government for the lands granted to the senior company. It is also stated in the order that there were filings and homestead entry upon the record and uncanceled at the time of the grant, and, further, that the railway company did not designate any tracts lost to the grant in lieu of which the tract in question was selected. On June 2, 1863, one William M. Walters made a homestead entry upon the land and received his certificate

therefor. He abandoned the land prior to December 3, 1866, and his entry was canceled for abandonment on October 7, 1875. On June 10, 1884, the railway company, claiming to own the land, conveyed the same to Lee Clark, who paid the full purchase price of the same, and afterward, for substantial considerations, it was transferred through several parties until January 7, 1885, when it was acquired by the plaintiff. The grantees subsequent to the defendant each, in turn, went into actual possession of the land, and remained in possession until July 31, 1886, and each grantee assumed and believed that the railway company had a good title to the land. On January 31, 1886, E. M. Cox made a homestead entry upon the land and took forcible possession of the same. He canceled the entry by relinquishment on March 10, 1888, when B. L. Herington homesteaded the land, but his entry was canceled by relinquishment on July 28, 1888. On the last-named date E. M. Cox made a declaratory statement, claiming settlement of the land on July
84 27, 1888, and afterward made final cash proof, and the final certificate was issued to him on July 26, 1889. A patent to the land was issued to Cox on October 15, 1890. When the selection of the land by the railway company was canceled time was given in which to appeal from the order of the Commissioner, but no appeal was ever taken. No notice was given to the defendant or to any of his grantees by the plaintiff of any contest over the land in the United States land office, now were legal proceedings of any kind ever commenced by Cox against the plaintiff to oust or evict him from the possession of the land.

Upon the facts the court found in favor of the defendant, holding that, by reason of the abandonment of the homestead by Walters, the land passed under the grant to the railway company, and that the plaintiff's title to the land, derived from the railway company, had not failed. Judgment was thereupon awarded in favor of the defendant for his costs. The plaintiff excepts, and brings the case here. The opinion was filed April 11, 1896.

J. H. Mahan, for plaintiff in error.

T. N. Sedgwick, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, *J.*:

The right of the plaintiff to recover depends upon whether there has been a failure of the title to the land in question, and which the defendant attempted to convey by a deed containing full covenants. If the railway company and those claiming under it acquired no title to the land, and if it remained public land, subject to pre-emption or homestead entry, then Cox acquired a good title to the land, and the contention of the plaintiff must prevail. The claim that the plaintiff must fail because he did not resist the entry of Cox is without force, if the paramount title was in the United States. 'Where the title to the land in controversy is in the United States and liable to entry and settlement under the provisions of the homestead
85 law, that of itself, is such a hostile assertion of the paramount title as would authorize the purchaser to voluntarily submit

to it.' (K. P. Rly. Co. *v.* Dunmeyer, 19 Kan. 539.) The question, then, is: Did the railway company acquire the land under the grant, and were the steps subsequently taken sufficient to vest it with title thereto? Under the act of Congress, there was granted to the State for the benefit of the railway company 'every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of the road, and not exceeding in all 10 sections per mile.' The act contained the provision that if any of the land specifically granted had been sold, reserved, or if the right of pre-emption or homestead settlement had attached to the same, an equal amount of other land might be selected from the public lands nearest to the excepted sections, and within 20 miles from the line of said road, for the purpose of making up such deficiency. (14 U. S. Stat. 289.) The land in question was not a part of the alternate odd-numbered sections specifically granted, but was within the 20-mile limit from which lands might be selected to supply those lost to the grant from sales or other disposition made before the date of the grant. If it had been within the place limits of the grant, the right of the company would have attached when the line of railway was definitely located opposite to it; but the grant of indemnity lands does not attach to any specific tracts until it is known what the deficiency is, and a selection is made to supply the deficiency, as the law requires. The court below seems to have proceeded upon the theory that the homestead entry of Walters, made in 1863, would, if it had been kept alive, have operated to exclude the land from the provisions of the grant; but that, by reason of his abandonment of the homestead, it passed under the grant to the railway company, and because of that fact the
86 plaintiff's title to the land had not failed. Not being within the place limits of the grant, it is immaterial that there was a homestead entry upon the land at the time of the grant or of the definite location. Being within the indemnity limits, it was only important to determine whether it was public land and subject to selection at the time the selection was actually made. If it had been within the place limits, the uncanceled entry of Walters would, under the recent decisions of the Supreme Court of the United States, and notwithstanding the abandonment, have operated to exclude it from the grant. (Railroad Co. *v.* Whitney, 132 U. S. 357; Whitney *v.* Taylor, 158 *id.* 85. See, also, Newhall *v.* Sanger, 92 U. S. 761; K. P. R'l'y Co. *v.* Dunmeyer, 113 *id.* 629; Bardon *v.* Railroad Co. 145 *id.* 535.) So far as the land in controversy is concerned, the legal effect of an abandonment was wholly immaterial, as no title to the land could be acquired by the company until the selection was made, and prior to that time the entry of Walters had been duly canceled.

Although the case was disposed of by the trial court upon an erroneous view, the question remains whether the railway company obtained title to the land by the subsequent selection that was made. It appears to have been made with the permission of the Land Department, in lieu of land lost to the company by reason of the attachment of homestead or pre-emption rights. The fees were paid,

and a certificate of selection was duly issued to the company. The land was within the indemnity limits of the grant, and, if it was subject to be selected by the company as indemnity land, it would seem, from the agreed facts, that the selection was properly made, and that the company was entitled to the land. It appears, however, that the land was in an even-numbered section, within
87 the place limits of the grant to the Union Pacific Railway Company, and, further, that it had been reserved to the United States for a specific purpose, and was therefore not subject to disposal under the general laws relating to the public domain. The granting act of July 26, 1866, under which the land in question was selected, contains a reservation clause excepting from the operation of the act all lands reserved by Congress or other competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, except for right of way of the railway. Under the Union Pacific grants, the odd-numbered sections within 20 miles of the line of road were granted, and by another provision the even-numbered sections within the limits of the grant were made double minimum lands, and rated at $2.50 per acre, and were only subject to entry under the laws relating to the disposal of such lands. (12 U. S. Stat. 489; 13 *id.* 356; 14 *id.* 79; 15 *id.* 39.) When the even-numbered sections within the place limits of the Union Pacific grant were set apart for the specific purpose named, they were, in fact, reserved by Congress, and in a certain sense segregated from the body of the public lands of the United States. This was the view taken in the case of United States *v.* M. K. & T. R'l'y Co., 141 U. S. 358. It was held, that, as the result of the construction of the railroad aided would be an increase of the market value of the sections remaining to the United States within the limits of the grant, the sections so reserved were excluded from the operation of the grant. 'In order that the Government might get the benefit of such increase of value and thereby reimburse itself to some extent for the land granted, * * * the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes, expressly declared, segregated them from the body of the public
88 lands of the United States.' Until the lands were actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes, the title thereto did not vest in the company, but remained in the United States and subject to its disposal. Long before the selection was made, the lands in question had been reserved and specifically set apart for a purpose wholly inconsistent with the theory that they might be taken for indemnity. If the company was permitted to select from the double minimum lands, it would thereby receive lands of twice the value of those lost to the company, and in lieu of which the selection was made. The theory upon which indemnity was provided was, that if the lands specifically granted had been disposed of, or the rights of settlers had attached to them, other equivalent lands might be selected in their place. It was certainly not the intention of Congress to enhance the grant by allowing a selection of lands of

twofold the value of those lost by previous disposition or reservation for other purposes. As the land in question had been reserved to the United States for a specific purpose, it was not subject to selection by the railway company, and the Land Department was without authority to transfer the land to the company, by the process of selection, certification, or by patent. No patent, however, was issued to the company, but, upon proceedings which appear to be regular, a final certificate was issued to Cox, and subsequently a patent in due form was issued to him. It therefore appears that there was a complete failure of title, and that the plaintiff is entitled to recover the damages sustained. We cannot ascertain from the agreed facts the amount of damages which should be awarded, and hence judgment cannot be ordered upon the findings.

The judgment will be reversed, and the cause remanded
89 to the district court to try and determine the amount of damages which the plaintiff has sustained. All the justices concurring."

And a mandate was issued by this court April 11, 1896 reversing said judgment of the district court and ordering that the cause be remanded for a trial and determination of the amount of damages which the plaintiff had sustained. Said mandate being in the words and figures following, to wit:

Mandate from Supreme Court.

SUPREME COURT, } ss:
State of Kansas, }

The State of Kansas to the district court within and for the county of Labette, in the State of Kansas, Greeting:

Whereas, in a certain civil action lately pending before you, wherein Monroe D. Herington was plaintiff, and Lee Clark was defendant, a judgment was rendered by you against the said plaintiff on a transcript of which judgment and record said plaintiff prosecuted a petition in error in the supreme court within and for the State of Kansas:

And whereas, at the April session of the January term of said supreme court, A. D. 1896, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the judgment of the district court be reversed, and that this cause be remanded for a trial and determination of the amount of damage which the plaintiff has sustained.

You are therefore commanded, that without delay you cause execution to be had of the said judgment of the supreme court, according to law.

Witness my hand, and the seal of the said supreme court affixed thereto, at my office, in the city of Topeka, on the 11th day of April, A. D. 1896.

[SEAL.]

C. J. BROWN,
Clerk Supreme Court.

Endorsed as follows: Monroe D. Herington *vs.* Lee Clark. Mandate from the supreme court. State of Kansas, Labette county, *ss.* Received and filed Sept. 2nd, 1896. E. C. Clark, clerk district court, by Colin Hodge, deputy.

At the February term 1897 of said district court said cause again came on for hearing on the identical pleadings and the identical evidence as on said trial at October term 1891 and shown by proceeding in error No. 8249, but in addition thereto the syllabus, statement, opinion and mandate of this court were offered in evidence as hereinbefore shown, yet, the court again rendered judgment in favor of said Lee Clark. The said Monroe D. Herington prosecuted another proceeding in error to this court which was filed herein on the — day of —— 1897 as No. 10909.

The petition in error, except the exhibits, being as follows, to wit:

In the Supreme Court of the State of Kansas.

MONROE D. HERINGTON, Plaintiff in Error,
vs.
LEE CLARK, Defendant in Error.

Petition in Error.

The said plaintiff in error, Monroe D. Herington, complains of the said defendant in error, Lee Clark, and for his petition in error alleges that in a certain action pending in the district court of Labette county, in the State of Kansas, in which the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, in which said court the said plaintiff sought to recover from the said defendant the sum of two thousand five hundred dollars (2,500.00) damages on account of the breach of conditions of seizin and warranty in a certain deed made by the said defendant Lee Clark to the grantors of the plaintiff. The said defendant, by the consideration of said court, recovered a judgment against the plaintiff adjudging that there had been no failure of title in said cause and adjudging
91 the said plaintiff to pay the costs therein; which said judgment was rendered in said cause by said district court on the 29th day of October 1891, and on said district court refusing a new trial therein, the plaintiff in error filed his petition in this court and upon consideration thereof said judgment was reversed by this court and upon the agreed statement of facts adjudged that said plaintiff was entitled to recover from the said defendant upon said covenants and remanded said cause to the district court of Labette county to assess the amount of the plaintiff's damages only and for no other purpose; that said judgment of this court was rendered at the April session of this court and at the January term of this court, A. D. 1896; and that said cause again coming on to be tried by the district court pursuant to said mandate, the said court again rendered judgment for the said defendant and against this

plaintiff, and denied to the plaintiff again a new trial of said cause upon his motion.

The record of the proceedings of said court and the evidence therein in a case-made is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff avers that there is error in the action and proceedings of said court in this.

First. That the said district court of Labette county erred in not limiting the trial of said cause under the mandate of the supreme court to the amount of damages to which the plaintiff was entitled to recover by reason of the breach of warranty assigned in his petition in said cause.

Second. The court erred in considering the other issues in said cause other than the amount of damages to which the plaintiff was entitled to recover, in violation to the directions of this court.

92 Third. That said district court of Labette county erred in finding and holding that the said plaintiff was not entitled to recover anything in said cause against said defendant.

Fourth. That said district court erred in finding for and rendering judgment for the defendant in said cause and against the plaintiff, and in refusing to enter judgment for the plaintiff in said cause for his damages as shown by the agreed statement of facts in said cause and the evidence upon said trial.

Fifth. That said district court erred in denying the plaintiff's motion for a new trial in said cause.

Wherefore, said plaintiff prays that the judgment may be reversed and that he may be restored to all things that he has lost by reason of said judgment and decision.

(Signed) NELSON CASE,
Attorney for Plaintiff in Error.

Issue and service of summons in error is hereby waived and the appearance of the defendant in error is hereby entered in said cause.

(Signed) T. N. SEDGWICK,
Attorney for Defendant in Error.

On December 10, 1898 this court again reversed said judgment of the district court and again remanded the cause to the district court for a determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. The opinion of this court is truly reported in vol. 55 of the Pac. Rep'r at page 462, and is as follows:

(Supreme Court of Kansas, Dec. 10, 1898.)

HERINGTON
vs.
CLARK.

"*Per Curiam:*

The trial court has evidently misapprehended the meaning of the prior decision of this court in this case, for, on precisely the

same state of facts that was presented to the court before, it has rendered the same judgment which this court reversed. 44 Pac. 624. The misapprehension doubtless arises from the fact that the cause was remanded for the determination of the amount of
93 the plaintiff's recovery, and, the plaintiff having failed to introduce further testimony or make any clearer showing than was then presented, the trial court has held that he was not entitled to any damages. The effect of the decision of this court was that the plaintiff was entitled to substantial damages; but, as the showing in the agreed statement of facts was meager and unsatisfactory, this court, fearing that injustice might be done by directing judgment at that time, saw fit to remand the case for a more full presentation of the facts bearing on the amount of the plaintiff's recovery. In the absence of any special circumstances, the general rule as to the measure of damages is that the plaintiff is entitled to recover the consideration, with interest to the date of the eviction. The statements as to the occupancy of the land are indefinite and unsatisfactory, and there is no showing as to its rental value. It may be that this court might have directed the entry of the judgment on the record presented on the former hearing; and it seems probable from the position now taken by counsel that the trial court has taken the view that this court was unable to determine from the statement of facts that the plaintiff was entitled to recover any sum as substantial damages, and that, having failed to make any further showing, none could be awarded by the trial court. This was a misconception of the decision of this court. The judgment must be reversed, and the cause remanded for the determination of plaintiff's damages, on such evidence as the parties see fit to produce."

On the hearing of said motion to dismiss the said Lee Clark introduced in evidence the following papers and documents, to wit:

"In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff, *vs.* LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

94 For good cause shown, the time heretofore given in which to serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed: In the district court of Labette county, Kansas—Monroe D. Herington, plaintiff, *vs.* Lee Clark, defendant—Extension of time to make case—Filed July 14, 1899. John Meyer, clerk district court.

STATE OF KANSAS, } ss:
Labette County, }

I, John Meyer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order of extension of time to make case—filed in the case of Herington *vs.* Clark, No. 4177, as the same remains on file and of record in my office.

Witness my hand and seal of said court this 14th day of May, A. D. 1900.

JOHN MEYER,
Clerk of the District Court, Labette County, Kansas."

"In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff, }
vs.
LEE CLARK, Defendant. }

STATE OF KANSAS, } ss:
County of Labette, }

John Mayer of lawful age, being first duly sworn, upon oath deposes and says that he is the clerk of the district court of Labette county, Kansas; that he has been such clerk for about three years last past: that he was such clerk of the district court in February and May 1899; that he is acquainted with Hon. A. H. Skidmore, the judge of said district court; that he is also acquainted with the case of Monroe D. Herington *vs.* Lee Clark, and was present
95 in court when all the proceedings were had in said case at the February and May 1899 terms of said court, the Hon. A. H. Skidmore presided as district judge, and was the presiding judge before whom the case of Monroe D. Herington *vs.* Lee Clark was heard and tried, and before whom all the proceedings were had in said cause at said February and May terms of said court; that he is the same A. H. Skidmore who allowed, settled and signed the case-made, and at the time of allowing, settling and signing said case-made he was still the duly elected, qualified and acting district judge of the district court of Labette county, Kansas, and the same judge before whom said case of Monroe D. Herington *vs.* Lee Clark was tried at the February and May terms of said court. And further affiant saith not.

JOHN MAYER.

Subscribed and sworn to before me this 31 day of May A. D. 1900.

T. W. CRAIN,
Probate Judge Probate Judge *of Labette County, Kansas.*

My commission expires —.

In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.
} Extension of Time in which to Make Case for Supreme Court.

Be it remembered, that heretofore to wit, on the 14th day of July 1899, the following proceedings were had and entered upon the journal of this court in the above cause to wit:

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until
96 the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed as follows: No. 4177—In the district court of Labette county, Kansas,—Monroe D. Herington, plaintiff *vs.* Lee Clark, defendant—Extension of time to make case—Filed July 14, 1899, John Mayer, clerk district court.

STATE OF KANSAS,
Labette County,
} *ss:*

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order made by court of extension of time to make case-made in the case of Monroe D. Herington *vs.* Lee Clark, No. 4177, as the same remains on file in my office.

Witness my hand and the seal of said court this 2nd day of June A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court, Labette County, Kansas."

And the foregoing is all the evidence that was introduced on said motion to dismiss. But this court overruled and denied said motion to dismiss, to which ruling and decision of the court the said Monroe D. Herington, defendant in error, then and there, duly excepted, and he prays that this his bill of exceptions be allowed and signed at this, the same term of the court at which said motion was heard, and that the same be filed and made a part of the record herein, which is accordingly done.

Witness my hand as chief justice of the said court and for the court on this 27th day of June, 1900 at the January term of said court for said year.

FRANK DOSTER,
Chief Justice.

97 Endorsed: 11637. Lee Clark *vs.* Monroe D. Herington. Bill of exceptions. Filed Jun- 27, 1900. D. A. Valentine, clerk supreme court.

98 And be it further remembered, that afterward, on the 1st day of August, 1900, the same being one of the regular judicial days of the July 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

99 *Journal Entry of Assignment.*

It is ordered that the following cases be assigned for hearing a the October 1900 session of this court:

* * * * * * *

CLARK
vs. } No. 11637.
HERINGTON.

* * * * * * *

100 And be it further remembered, that on the 3rd day of October, 1900, the same being one of the regular judicial days of the July, 1900, term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

101 *Journal Entry of Submission.*

LEE CLARK, Pl'ff in Error,
vs. } 11637.
MONROE D. HERINGTON, Def't in Error.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Labette county; and thereupon, after oral argument by David Martin for the defendant in error, said cause is submitted on brief of counsel for both parties, and taken under advisement by the court.

102 And be it further remembered, that on the 10th day of November 1900, the same being one of the regular judicial days of the July 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

103 *Journal Entry of Decision.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiff in error pay the costs of this case in this court taxed at $—, and hereof let execution issue.

104 And also on the said 10th day of November, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, the opinion of said court in this cause, which opinion is in words and figures as follows, to wit:—

105 LEE CLARK
v.
MONROE D. HERINGTON. } No. 11637.

Error from Labette county. Affirmed.

Opinion.

Per Curiam: This is the third time this case has been in this court. Herington *v.* Clark, 56 Kan., 644; Same *v.* Same, 55 Pac., 462. Upon both the former hearings we held against the present plaintiff in error, Clark, upon the question of land title involved. He presents to us again the same question and none other. The law having been found against him upon the former hearings, and having been sufficiently declared in the opinions already rendered, the judgment of the court below will be, therefore, affirmed.

A true copy.
Attest:
[SEAL.]

D. A. VALENTINE,
Clerk Supreme Court.

106 And afterward, on the 10th day of December, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for writ of error, which, with the endorsements thereon is in the words and figures as follows, to wit:—

107 *Petition for Writ of Error.*

To the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas:

Comes now Lee Clark, by James Hagerman and T. N. Sedgwick, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in the suit wherein he, the said Lee Clark, was plaintiff in error and Monroe D. Herington was defendant in error in the supreme court of the State of Kansas, at the

July 1900 term thereof, to wit, November 10th, 1900, a manifest error hath been committed against him in this, to wit:

That in the cause in which such judgment was rendered by the said supreme court of Kansas, the said Lee Clark claimed and contended that under and by virtue of an act of Congress approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," the Missouri, Kansas & Texas Railway Company had the right to select for indemnity purposes the following-described piece of land, to wit:

The south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15, range 5 east of the sixth principal meridian.

That the selection was made by said railway company. That under and by virtue of said act of Congress it thereby became possessed of a good and indefeasible title to the same, and could sell and convey the same by deed of conveyance. That he, the said Lee Clark, became possessed of the legal and equitable title to said land by virtue of a conveyance to him by said railway company after such selection, and that his deed conveying said land gave good title thereto to his grantee, the said Monroe D. Herington, and that his said grantee was a *bona fide* and innocent purchaser of the title to said land within the intent and meaning of an act of Congress approved March 3rd, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for
108 other purposes," and that as such, the title of his said grantee thereto is fully protected by said act. And the decision of the said supreme court of the State of Kansas was against the validity of said claims of said plaintiff in error, all of which fully appears from a transcript of the record and judgment in which cause herewith submitted.

Wherefore, said Lee Clark, plaintiff in error, prays the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

109 [Endorsed:] 11637 Lee Clark *vs.* Monroe D. Herington Petition for a writ of error Filed Dec. 10 1900 D. A. Valentine clerk supreme court.

110 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error which with the allowance thereof and the endorsements thereon, is in the words and figures as follows, to wit:

111 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Lee Clark, plaintiff in error, and Monroe D. Herington, defendant in error, wherein the claim was made by the said Lee Clark, plaintiff in error, that under and by virtue of an act of Congress, approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," the Missouri, Kansas & Texas Railway Company had the right to select for indemnity purposes the following-described piece of land, to wit:

The south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15, range 5 east of the sixth principal meridian.

That the selection was made by the said railway company. That under and by virtue of said act of Congress it thereby became possessed of a good and indefeasible title to the same, and could sell and convey the same by deed of conveyance. That he, the said Lee Clark, became possessed of the legal and equitable title to said land by virtue of a conveyance to him by said railway company after such selection, and that his deed conveying said land gave good title thereto to his grantee, the said Monroe D. Herington, and that his said grantee was a *bona fide* and innocent purchaser of the title to said land within the intent and meaning of an act of Congress, approved March 3rd, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," and that as such, the title of his said grantee
112 thereto is fully protected by said act, and the decision was against the validity of such claim of said plaintiff in error; a manifest error hath happened to the great damage of the said Lee Clark, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10 day of December, in the year of our Lord one thousand nine hundred.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the United States Circuit Court for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice of the Supreme Court of Kansas.

113 [Endorsed:] 11637 Lee Clark *vs.* Monroe D. Herington Writ of error Filed Dec. 10 1900 D. A. Valentine clerk supreme court

114 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a supersedeas bond which, with the approval thereof and the endorsements thereon is in words and figures as follows, to wit:

115 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Supersedeas Bond.

Know all men by these presents, that we, Lee Clark, as principal, and E. B. Stevens as his surety, both of Parsons, Labette county, Kansas, are held and firmly bound unto the above-named Monroe D. Herington in the sum of six thousand ($6,000) dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, and all our heirs, executors, administrators and assigns, jointly and severally firmly by these presents. The conditions of the above bond are that whereas the above-named Lee Clark as plaintiff in error, has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment of the supreme court of Kansas in the above-entitled case:

Now, therefore, the conditions of this obligation are such that if the above-named Lee Clark shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Witness our hands this 8th day of December, 1900.

LEE CLARK,
By T. N. S.
E. B. STEVENS.

116 STATE OF KANSAS, } ss:
County of Labette, }

E. B. Stevens, of lawful age, being first duly sworn upon oath deposes and says that he is a resident of Labette county, Kansas and is the E. B. Stevens who signed the above bond as surety for Lee Clark. And affiant further says that he is worth the sum of six thousand dollars over and above all debts, liabilities and exemptions allowed by law. And further affiant saith not.

E. B. STEVENS.

Subscribed in my presence and sworn to before me this 8th day of December, A. D. 1900.

[Notary Public Seal.]

OTTA L. CALDWELL,
Notary Public.

My commission expires January 15th, 1901.

The above bond accepted and approved by me this 10th day of December, A. D. 1900.

FRANK DOSTER,
Chief Justice of the State of Kansas.

(Endorsed on back:) 11637. In the supreme court of the State of Kansas. Lee Clark, pl'ff in error, *vs.* Monroe D. Herington, def't in error. Supersedeas bond. Filed Dec. 10, 1900. D. A. Valentine, clerk supreme court.

117 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for costs, which, with the approval thereof and the endorsements thereon is in words and figures as follows, to wit:

118 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Bond for Costs.

Know all men by these presents: That we, Lee Clark as principal, and E. B. Stevens as his surety, both of the city of Parsons, Labette county, Kansas, are held and firmly bound unto the above-named Monroe D. Herington in the sum of five hundred ($500.) dollars, to be paid to him the said Monroe D. Herington, his heirs, executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves jointly and severally, and our heirs, executors, administrators and assigns, firmly by these presents, upon the following conditions, to wit:

Whereas the above-named Lee Clark has prosecuted a writ of error in the above-entitled cause in the Supreme Court of the

United States to reverse a judgment rendered against him in the above-entitled cause by the supreme court of the State of Kansas:

Now, therefore, the conditions of this obligation are such that if the said Lee Clark shall prosecute his said writ of error and answer all costs, if he shall fail to make good his plea, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

LEE CLARK,
By T. N. S.
E. B. STEVENS.

The above bond approved by me this 10 day of December, 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of Kansas.

119 [Endorsed:] 11637 In the supreme court of the State of Kansas. Lee Clark, pl'ff in error, *vs.* Monroe D. Herington, def't in error. Bond for costs. Filed Dec. 10 1900 D. A. Valentine clerk supreme court.

120 And afterwards, on the 18th day of December, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a citation, together with an acknowledgement of the service of the same, which, with the endorsements thereon is in the words and figures as follows, to wit:

121 UNITED STATES OF AMERICA, *ss:*

To Monroe D. Herington:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein Lee Clark is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected, and why speedy justice should not be done to the plaintiff in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of December, 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the above citation acknowledged this 14th day of December, 1900, but it is not admitted that error lies herein, but on the contrary it is claimed that this proceeding in error is too late.

DAVID MARTIN,
Attorney for Monroe D. Herington, Named as Defendant in Error.

122 [Endorsed:] 11637. Lee Clark *vs.* Monroe D. Herington Citation Filed Dec. 18 1900 D. A. Valentine clerk supreme court.

123 In the Supreme Court of the State of Kansas.

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } No. 11637.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above-entitled cause, as the same now remain on file and of record in my office.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 21st day of December, A. D. 1900.

Seal Supreme Court, State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

124 In the Supreme Court of the State of Kansas.

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } No. 11637.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas, on the 10th day of December, 1900, and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and proceedings of this court, in the within-entitled cause, with all things concerning the same.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 21st day of December, 1900.

Seal Supreme Court, State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 18,015. Kansas supreme court. Term No. 223. Lee Clark, plaintiff in error, *vs.* Monroe D. Herington. Filed January 9th, 1901.